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IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. JOHN J. ROONEY, Defendant-Appellant.	Appeal from the Circuit Court of St. Clair County. Honorable J[illegible] Gray, Judge Presiding.

Goldenhersh, J.

Defendant, John J. Rooney, was tried by jury in the Circuit Court of St. Clair County, convicted of the offense of murder (Ill. Rev. Stat. 1965, ch. 38, section 9-1), and sentenced to the Illinois State Penitentiary for not less than [illegible] nor more than 20 years.

As grounds for reversal defendant argues that the trial court erred in refusing to give 3 instructions tendered by defendant, each of which pertained either to self defense, or defense of third persons, and erred further in excluding testimony of the general reputation of the deceased for being a violent, dangerous and quarrelsome person.

The evidence shows that on the early morning of January 21, defendant shot and killed George "Stormy" Harvill.

Defendant, and Anita Sarro, Harvill's former wife, had met at the home of mutual friends earlier in January 1966, and prior to January 20, 1966, had gone out together on 5 or 6 occasions.

Mrs. Sarro, called by The People, testified that she was divorced from Harvill in December 1965, and despite her protestations, he persisted in visiting her. He had threatened to kill her and any man she "dated". She told defendant of her fear of Harvill, and at her request defendant obtained a gun and gave it to her.

On the evening of January 20, 1966, defendant and Mrs. Sarro visited the home of friends and after leaving there, spent some time in a tavern. In defendant's car, with defendant driving, they arrived in front of her home at approximately 2:00 A. M. on January 21, 1966.

Mrs. Sarro's automobile was parked in front of her home, and defendant stopped his car immediately behind it.

Mrs. Sarro resided in the north half of a two family building. There is a driveway located on each side of the building, the one to the south being for the use of the occupants of the building in which Mrs. Sarro lived, and the one to the north being used by the occupants of a building situated north of that driveway. When defendant stopped his car, it was located in front of the southerly driveway.

Shortly after defendant parked his car, Harvill came running out of Mrs. Sarro's home. He stopped alongside her car, and she thought he made a written note of the license number of defendant's car. Harvill then ran toward defendant's car and appeared to be "screaming" something.

Defendant asked her if she had her gun, she answered in the affirmative, and at his request gave it to him.

Defendant directed her to open the car door and "see what he wants". He also told her to "get in the house and call the police". As she opened the car door, Harvill yelled "I'll kill you, I'll kill you both".

As she left the car, defendant got out of the door on the driver's side. Harvill made no effort to stop her, and when she entered the house, Harvill had moved away from the car and was standing at the south corner of the building in which she lived. As she passed

through her living room she heard a shot. Shortly thereafter, she heard several more shots.

Defendant's testimony, to the point of Mrs. Sarro's departure from the car, and except for the manner in which defendant got out of the car, is substantially the same as hers. He testified that he did not previously know Harvill, Mrs. Sarro told him that it was he, and at the same time said "lock the door". He turned to see if there was someone behind him and saw a white Buick parked across the street, at an intersection, facing east. He thought the Buick belonged to someone whom he knew to be a friend of Harvill's. Defendant testified that he left the car by climbing over Mrs. Sarro and leaving by the door on her side. When Harvill saw him leave the car he "run between those two buildings". He could not see Harvill's hands. He then testified:

> "I thought they had me bracketed. I thought that his partner was on the other side of the street and I didn't dare get out on that side and take cover behind my car. I thought that's why he was on one side of the car instead of coming up to the driver's side and threatening me. I figured he had come around to the other side so that his partner had me from the back where I couldn't run across the street. I got out facing him and the same side that he was on."

He testified further:

> "....I figured he was taking cover when he saw the gun and so I took a shot at him. He took off running down this alley. I stepped out to where I could see him and I fired maybe three times, it was three times but I didn't know then. I fired up in the air a few times to keep him running. When he got down to the end of the alley, the end of the driveway, he turned left."
>
> "Q. What happened after you saw him run to the left around the building?"
>
> "A. I went back to her door. At the time I thought that I had run him off. I went back to her door to get her and her kids and get out of there so that he wouldn't come back after her when I had gone. And when I got to her door I thought, well he is running around behind the house. I thought maybe he was sneaking up on me coming all the way around

the house and was going to come up on me from the other side. So I had run from her door which is only about four steps over to the driveway, and there he was just crouching around and coming around in front of this other garage there."

"Q. Where was he facing?"

"A. Facing me. Facing the street. He had taken a couple of steps toward the street. Maybe a yard from the corner at the end of the building which isn't shown here and he was coming toward me."

"Q. Did you see him take a couple of steps toward you?"

"A. No. I just saw him right there. He took about one step, I guess, when I come around."

"Q. And what happened after that?"

"A. I started shooting at him again. I hit him. Well I fired three times. He spun around and landed on the ground. I didn't know how bad I hit him. I run up to hit him with the pistol. I didn't know how bad he was hurt then....."

Dr. C. C. Kane, Coroner of St. Clair County, was called to the scene and pronounced Harvill dead. He testified that Harvill had "two gun shot wounds, either one would have proved fatal...."

There was no gun found upon, or near, Harvill's body. There is no evidence that anyone else was present, or that the presence of the Buick was anything but a coincidence.

Under the provisions of Sec. 7-14 of the Criminal Code of 1961 (Ch. 38, sec. 7-14, Ill. Rev. Stat. 1965) justifiable use of force is an affirmative defense. Section 3-2 of the Criminal Code provides that unless the State's evidence raises the issue of an alleged affirmative defense, the defendant, to raise the issue, must present some evidence thereon.

Section 7-1 of the Criminal Code provides: "A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's <u>imminent</u> (emphasis ours) use of

unlawful force". A review of the record fails to show in what manner the allegedly threatened unlawful force might be deemed to have been imminent. It is obvious that Harvill had withdrawn some distance from defendant's car, was not armed, and seems to have been concerned more with flight than combat. Under the evidence, the court properly refused to give defendant's instructions on self defense.

With respect to defendant's second contention, it is so firmly established as to require no citation of authority that evidence of the reputation of a deceased for a violent and dangerous disposition is material and relevant to the issue of self defense. However, such evidence is not admissible until evidence is adduced from which it may be inferred that the use of unlawful force was imminent, or that defendant reasonably believed that his use of force was necessary to prevent imminent death or great bodily harm to himself or another (Ch. 38, sec. 7-1, Ill. Rev. Stat. 1965). In the absence of such evidence in this record, the trial court did not err in excluding the proffered testimony.

For the reasons set forth, the judgment of the Circuit Court of St. Clair County is affirmed.

Judgment Affirmed.

Concur: George J. Moran

Concur: Edward C. Eberspacher

PUBLISH ABSTRACT ONLY

A

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No. 50870

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	
vs.	)	COURT OF COOK COUNTY,
	)	
LACEY VELL KNOWLES,	)	CRIMINAL DIVISION.
	)	
Defendant-Appellant.	)	

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

The defendant-appellant, Lacey Vell Knowles, was indicted for the murder, by shooting, of his former wife, Eliza Dorris, otherwise called Eliza Dorise. He pleaded not guilty and demanded a jury trial. The jury returned a guilty verdict, judgment was entered on this verdict, and the defendant was sentenced to not less than 50 years nor more than 100 years in the Illinois State Penitentiary. When his motions for a new trial, in arrest of judgment, and judgment notwithstanding the verdict were denied, he filed his Notice of Appeal.

It is an admitted fact that the defendant fired three shots at the decedent, his former wife, one of which caused her death. The disputed fact concerns the homicide's surrounding circumstances as the defense argued at the trial that the deceased was reaching into her handbag for a weapon, causing her death to be either justifiable homicide due to self-defense, or, at most, voluntary manslaughter if the defendant's belief that the deceased's death was necessary to prevent imminent death or great bodily harm to himself was unreasonable. The State argued that the homicide was murder because the deceased never reached into her handbag but rather the defendant killed her intentionally and knowingly.

The homicide occurred on the open front porch of the deceased's residence at 6837 South Perry in Chicago, Illinois. There were two eyewitnesses, W. C. Dorise and McKinley Turner,

half brothers to each other and nephews of the deceased. They testified for the prosecution and stated that the homicide occurred on August 29, 1964, at approximately 11:45 A.M. when the deceased was returning home from grocery shopping and was being assisted by her nephews.

Earlier in the day the defendant had been at the homicide scene seeking repayment of a debt owed to him by his former wife. She told him that she would see him after returning from shopping. Upon returning, she then told him to wait for her on the front porch and she would talk to him there after taking the groceries upstairs.

The deceased placed the key in the door with her right hand and was carrying her handbag and a small paper bag in her left hand. Both prosecution witnesses testified, and the defendant admitted, that he then tried to force his way past the deceased and into her doorway but she pushed him back, causing him to fall. The eyewitnesses stated he then said: "If I can't go up there, you won't go up either" and shot his former wife three times. They also testified that the deceased never struck the defendant but merely pushed him back when he tried to push his way past her. They went on to say that she never reached into her handbag at any time. After the shooting, the defendant walked back to his car and drove off, not waiting for the police.

Detective Anderson testified for the State and stated he investigated the homicide fifteen minutes after it had occurred and found no weapon either in the deceased's handbag or on her person or on the person of the two eyewitnesses or anywhere else in the immediate vicinity. The deceased had been shot three times.

Gretel Dorise testified for the State and stated she was the wife of W. C. Dorise, one of the eyewitnesses to the homicide, and lived with him and his aunt, the deceased, in the latter's apartment. The deceased had obtained an uncontested

divorce from the defendant a month before the homicide, alleging physical cruelty. Continuing, Mrs. Dorise testified that she had received a telephone call from the defendant in the deceased's apartment in the early morning hours of the day of the homicide (i.e., between midnight and 12:30 A.M.), and he had stated at that time: "You tell her if she doesn't let me in tonight and don't come downstairs, I am going to kill her even if it be next year." On cross-examination the defense asked her if she and her husband were trying "to get" the defendant. She answered it was not true.

The defendant testified as the only defense witness, stating that W. C. Dorise had pawned his gun with the deceased as security for a loan from her and the defendant thought it was this weapon which the deceased was trying to get out of her handbag. Earlier in the trial W. C. Dorise had testified but did not mention any alleged pawning. The defendant went on to say that he never threatened his wife's life after they had separated in early 1964. He admitted calling his former wife the day of the homicide but at approximately 7:00 A.M. and not at midnight. The purpose of the call was not to threaten the deceased's life but to recover the money owed him.

He was carrying a weapon on the day of the homicide for self-protection as he had been drinking on the west side the previous night. Once before he had been the victim of an armed robbery in that part of the city. On cross-examination he admitted that he had returned to his girl friend's apartment for about twenty minutes after meeting his former wife for the first time on the day of the homicide, and he knew at that time that he would not be returning to the west side. In response to a prosecution query as to why he did not leave this gun at his girl friend's apartment, which is where he was living, the defendant stated he just was not thinking about the gun at that moment.

Turning to what happened at the time of the shooting, the defendant testified that the deceased pushed him back when he tried to force his way past her into her doorway. She also struck him on the left ear and shoulder before reaching into her handbag which is when he fired at her, fearing for his own life. On cross-examination it was pointed out to him that the two eyewitnesses had earlier testified for the State that the deceased neither struck him nor reached into her handbag. He replied that they would say this, although under oath, because she was their relative. He went on to say that although the deceased was only three feet from him, he at no time tried to knock the handbag from her. He threw the weapon away that same day, hid in various parts of Chicago, and voluntarily surrendered to the police approximately a month later in the presence of his former attorney.

On appeal, the defendant-appellant is contending that he was not proven guilty of murder beyond a reasonable doubt because the evidence shows that he was guilty of voluntary manslaughter only, due to his unreasonable mistake in fearing for his own life and that this court should use its authority under S.H.A. Chap.38, §121-9(b)(3) to so reduce the offense and that this court should use its authority under S.H.A. Chap.38, §121-9(b)(4) to reduce the sentence imposed by the trial court.

The State-appellee argues that the defendant was proven guilty of the greater offense of murder beyond a reasonable doubt and that the sentence imposed by the trial court was within the statutory limits and was not excessive in this instance.

As so often happens in criminal cases, the testimony of both sides is diametrically opposed. The defendant testified that W. C. Dorise had pawned his gun with the deceased who had struck the defendant, before reaching into her handbag, apparently for the weapon. Two eyewitnesses to the offense denied that the deceased struck the defendant or reached into her handbag at any

time, and W. C. Dorise, although testifying, said nothing about the gun pawning matter, never having been asked about it. Furthermore, the defendant testified he never threatened his wife's life after they separated whereas a prosecution witness testified he had made such a threat over the telephone in the early morning hours on the day of the homicide. The defendant denied calling at this time.

Two eyewitnesses testified that almost simultaneously with the shooting, the defendant said: "If I can't go up there, you won't either." The defendant never denied this but rather remained silent as to this aspect of the case. There is also the unexplained reason as to why the defendant was carrying his weapon the day of the homicide when he knew that he would not be returning to the west side and when he had the opportunity of leaving it at his place of residence. The State argued this showed premeditation, whereas the defendant stated he was not thinking about any weapon when he returned to his apartment shortly before the subsequent homicide.

The jury had the responsibility of deciding disputed questions of fact. The evidence was highly conflicting but the jury made its decision and convicted the defendant of murder after evaluating the credibility of the individual witnesses and weighing the testimony of both sides. The defendant brought out that the prosecution's case was based upon the testimony of the deceased's relatives whom the defense sought to impeach by showing their alleged bias against the defendant. By their verdict, the jury chose to believe the prosecution's witnesses and this determination will not be disturbed by a reviewing court unless the record indicates a reasonable doubt of the defendant's guilt.

The defendant contends that the record justifies a voluntary manslaughter conviction only. The cases cited by him involve either voluntary manslaughter convictions arising from

sufficient provocation to kill caused by a struggle in which the deceased was armed, or self-defense pleas to a murder charge which this defendant has waived on appeal. The record does not indicate any struggle and the deceased was not armed. The defendant cites no cases in support of his alternative assertion that the murder conviction should be reduced to voluntary manslaughter because he made an unreasonable mistake in fearing for his life. Suffice to say that the jury did not believe this theory although given an instruction thereon.

Evidence in the record shows this homicide to be murder, the act of killing a human being, coupled with either express malice as reflected by the defendant's threats on the deceased's life the day of the murder or implied malice as reflected by the defendant's use of a deadly weapon, a gun, resulting in an unprovoked and murderous assault upon the deceased. People v. Smith, 71 Ill.App.2d 446, 219 N.E.2d 82 (1966). There is ample competent, credible evidence in the record to support the jury's murder conviction.

Secondly, the defendant argues that this court should reduce the sentence imposed by the trial court. The hearing on aggravation and mitigation of the offense is included in the record. It indicates that the defense raised before the trial court the identical points it is repeating on appeal; namely, that this is the first time the defendant, a man of thirty-six and a medical technician combat veteran in the Korean War, has been in trouble with the police. Furthermore, the defendant has worked for the same employer for the thirteen years prior to this homicide and has risen from general laborer to foreman.

The record indicates that the trial court took these factors into consideration but gave greater weight to the fact that the passage of one of the three bullets entering the deceased's body indicated that she had been shot in the back. The trial court characterized this homicide as a cold-blooded

killing, one of the most heinous crimes known to man. Giving this point paramount importance was within the trial court's discretion as it addressed itself to sentencing the defendant.

The cases cited by the defendant in seeking to have his sentence reduced by the Appellate Court are not helpful. People v. Shannon, 56 Ill.App.2d 154, 206 N.E.2d 106 (1965) and People v. Pruitt, 72 Ill.App.2d 419, 219 N.E.2d 705 (1966) are both abstract opinions not reflecting the detailed facts upon which the Appellate Court acted in reducing the sentence. People v. Mitchell, 73 Ill.App.2d 35, 220 N.E.2d 19 (1966) and People v. Owens, 73 Ill.App.2d 108, 219 N.E.2d 733 (1966) are distinguished from this case as they both involved homicides growing out of physical struggles in which the decedent had either stabbed the defendant initially, or had been the aggressor and was much younger, heavier and stronger than the defendant. A physical struggle is not involved in this case and the evidence indicates that the defendant was the aggressor and much the stronger of the two.

The court is aided by the case of People v. Hobbs, 56 Ill.App.2d 93, 205 N.E.2d 503 (1965) in which the defendant had been placed on probation for five years after pleading guilty to burglarizing a service station from which he took $6.50 in tools. Within three months, he broke probation by being convicted of another offense resulting in his being sentenced to 3 to 10 years on his prior plea of guilty to the burglary charge. In refusing to reduce his sentence, the reviewing court said at 56 Ill.App.2d 93, 98-99 and at 205 N.E.2d 503, 506:

> On appeal, it is only under rare and unusual circumstances that a reviewing court will interfere with the discretion of the trial judge in the imposition of a sentence. . . . Accordingly, before an appellate court will interfere, it must be manifest from the record that the sentence is excessive and not justified by any reasonable view which might be taken of the record.

In this case the sentence imposed by the trial court

was not excessive but rather was within the statutory limits for murder and was commensurate with the enormity of the defendant's offense, which the record indicated to be cold-blooded murder.

For the above reasons, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., and McNAMARA, J., concur.

51228

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM THE
vs.	)	CIRCUIT COURT OF
WILLIAM DAVIS (Impleaded), Defendant-Appellant.	)	COOK COUNTY.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was tried at a bench trial for the crime of murder, found guilty of voluntary manslaughter and sentenced to a term of three to eight years in the penitentiary. On this appeal he maintains he was not proved guilty beyond a reasonable doubt in that the evidence shows he acted in self-defense.

Chicago Police Officer James Anderson testified that about 1:30 or 2:00 A.M. on the morning of July 9, 1965, he went to the home of defendant, William "Butch" Davis, aged 19, and inquired of him whether he had stabbed a man earlier that night. Upon prompting from defendant's father to tell the truth, defendant related the following to the officer:

Defendant, William Freeney and defendant's fiancee, Patricia Morris, were riding in defendant's automobile in a southerly direction on Western Avenue in Chicago about 11:00 or 11:30 P.M. on July 8th. Defendant stopped the automobile for a traffic signal at the intersection of Washington Boulevard and while waiting for the signal to change, they observed Miss Morris' sister and her sister's girlfriend engaged in a conversation with a man (the victim, Jack Hull) on the sidewalk. Hull was "bothering the girls and calling them names and trying to proposition them into going with him." The girls left Hull and proceeded south on Western Avenue.

The officer related that defendant told him he drove westerly on Washington Boulevard and proceeded one block to Campbell

Avenue. He turned south on Campbell Avenue and proceeded to an east-west alley between Washington and Warren Boulevards, drove east into the alley to a point where it intersects Western Avenue where he brought the automobile to a stop. As Hull approached the place where the automobile was parked, a friend of defendant, Seaborn Davis (no relation to defendant,) approached. Words were had between the Davis boys and Hull concerning the nature of the conversation Hull was having with the girls, and Seaborn Davis knocked Hull to the ground. Hull began to struggle and defendant jumped on him. Defendant then stabbed Hull several times in the stomach with his, defendant's,pocket knife. Defendant told the officer that he threw the knife into a nearby yard and fled the scene. The officer testified that the knife was never located although a search had been made for it.

Defendant was placed under arrest and taken to the police station where he was advised of his constitutional rights by an assistant state's attorney. Defendant voluntarily gave a statement which was reduced to writing and read, corrected and signed by defendant. The written statement was substantially the same as the oral statement of defendant to which Officer Anderson testified.

Because of certain inconsistencies in statements previously made by Patricia Morris to the police and at the coroner's inquest, the trial court permitted her to be called as a court's witness. She testified that she was proceeding on foot north on Western Avenue about 11:00 P.M. on July 8th to meet the defendant, when Jack Hull got out of an automobile, took hold of her arm and asked her to go home with him for a few drinks. The witness testified that when she refused, Hull knocked her to the ground, cutting her wrist with a knife in the process. Hull took a gun from his pocket

and threatened to kill Miss Morris if she did not accompany him. Seaborn Davis came on the scene from Hull's rear side and struck Hull, causing him to fall on his back and drop the knife. Miss Morris stated defendant picked up the knife and stabbed Hull. Defendant and Miss Morris then returned to defendant's automobile and William Freeney drove them home.

Miss Morris testified that the foregoing testimony is what she told the police, but Officer Anderson testified in rebuttal that Miss Morris did not tell him of the cut on her wrist nor of the gun with which she was allegedly threatened. The officer also stated that he did not observe any lacerations upon the arms, hands or wrists of Miss Morris when he interviewed her the following day.

Defendant testified in his own behalf and stated he and William Freeney were driving south on Western Avenue about 11:30 P.M. on the date in question when he stopped his automobile for a traffic signal at the Washington Boulevard intersection. Seaborn Davis approached defendant's automobile and told defendant that someone was beating Miss Morris. Defendant stated he observed Hull standing over Miss Morris "with something in his hand." A friend of defendant, Louis Murray, then drove up in his automobile and also informed defendant that someone was beating Miss Morris. Defendant testified that he drove his automobile west on Washington Boulevard, south on Campbell Avenue and then turned east into an alley between Washington and Warren Boulevards. Defendant alighted his automobile at the mouth of the alley as it intersects Western Avenue and told Hull to let Miss Morris alone and to go about his business. Defendant testified that Seaborn Davis knocked Hull down, that a knife fell from his hand, that he, defendant, reached for the knife, but that Hull caught hold of his leg. A struggle ensued and Hull was stabbed. On cross-examination

defendant denied he told Officer Anderson that he used his own knife in the stabbing.

Louis Murray testified for the defense and related that on the night of the occurrence he left his place of employment, a hot dog stand at Lake Street and Western Avenue, about 10:30 P.M. and asked Miss Morris if she wished a ride home. She declined, stating that she was to meet defendant, and began walking south on Western Avenue. Murray drove south on Western Avenue and turned west onto Washington Boulevard when he noticed a man take hold of Miss Morris by the wrist. Defendant and Seaborn Davis approached the man, and defendant and the man began to struggle. Murray stated that the man had something in his hand, that the man and defendant were struggling and that he (the witness) became a bit frightened and left the scene.

Seaborn Davis testified he was near the corner of Washington Boulevard and Western Avenue about 11:30 P.M. on July 8, 1965, when he saw Hull alight an automobile, take hold of Miss Morris and knock her to the ground. Defendant approached in his automobile and the witness told him what was taking place. Louis Murray drove up in his automobile and also informed defendant of what was happening. The witness testified that defendant then turned west onto Washington Boulevard and drove to the mouth of an east-west alley running between Washington and Warren Boulevards. The witness stated Hull was bending over Miss Morris with a knife and that he hit Hull from the rear and knocked Hull down onto his back. The knife fell out of Hull's hand and defendant picked it up. Defendant and Hull struggled and Hull was stabbed. Miss Morris and defendant fled down Western Avenue and entered an automobile containing William Freeney, and the witness went home.

Patricia Morris was called as a defense witness and testified that she was walking on Maypole Avenue about 11:30 P.M. on

the night of July 8, 1965, when she saw Hull sitting in an automobile. Hull alighted the automobile and asked the witness to accompany him to his home for a few drinks. Miss Morris testified she declined the offer and walked to Western Avenue to a hot dog stand where she was supposed to have met defendant. Defendant was not there and the witness began walking south on Western Avenue. Hull was still following Miss Morris and again asked her to go with him. Miss Morris again refused and Hull took hold of her neck, causing her to fall to the ground. In the process Hull cut Miss Morris' wrist with his knife. Hull threatened to kill the witness with a gun if she did not accompany him. Seaborn Davis then approached Hull from the rear and knocked him down, causing the knife to fall from his hand. Defendant then struggled with Hull, managed to get the knife into his possession and stabbed Hull.

A coroner's pathologist testified that Hull's body bore nine or ten stab and cut wounds and the fatal wound was inflicted into the stomach.

The contention raised by defendant that his guilt was not proved beyond a reasonable doubt for the reason that the evidence shows he acted in self-defense is groundless. The evidence presented by the State and that presented by the defendant contained certain irreconcilable facts which could be resolved only by the trier of fact by determining the credibility of the witnesses and the weight to be afforded their testimony. People v. Potts, 403 Ill. 398, 406; People v. McClain, 410 Ill. 280, 286.

The State's case consisted primarily of the oral and written statements given by defendant to Officer Anderson shortly after the slaying and to an assistant state's attorney on the following day. Neither statement contains any facts tending to show defendant acted in self-defense when he killed Hull. On the contrary,

the written statement given to the assistant state's attorney, which was read, corrected and signed by defendant, contains the following question: "Was there any reason for the stabbing?" Defendant's answer was, "Yes, because he kept bothering me." When asked to elaborate on that answer, defendant stated that Hull was "bothering" him by the way Hull was speaking to the girls, calling them names and propositioning them. The State's evidence shows that defendant, after Seaborn Davis knocked Hull to the ground and after the knife fell out of his hand, used his own pocket knife to stab Hull nine or ten times. There is no evidence that defendant was forced to stab Hull because the latter intended to kill him or do him serious bodily harm; Hull had been knocked to the ground and had lost his weapon.

The testimony in defendant's case attempted to establish that defendant acted in self-defense when he stabbed Hull. The trial judge chose not to believe this to be a fact and we are of the opinion he was justified in so doing. Not only was Hull stabbed nine or ten times, but defendant's evidence shows that at the time he went to pick up the knife which had fallen from Hull's hand, Hull had been knocked onto his back and the danger to Miss Morris and to defendant, if any, had passed. Furthermore, defendant had the aid of Seaborn Davis in rescuing Miss Morris from Hull's threats and advances. On the contrary, the trial judge could reasonably have found defendant to have been incensed when he was told his fiancee was being molested, and later seeing this to be a fact, that he retrieved the knife which had fallen from Hull's hand and in anger proceeded to stab and cut Hull nine or ten times.

Defendant further contends that since three different "versions" of the incident were given, the trial judge could have believed only the third "version" which shows defendant acted in self-defense since defendant was found guilty of voluntary manslaughter. Contrary to this contention, the trier of fact is

not limited to any given "version" of an occurrence, but will look to and consider all of the evidence in the case in arriving at a conclusion.

The numerous cases cited by defendant in support of his position that he acted in self-defense are distinguishable on their facts. (E.g. People v. Brown, 78 Ill. App. 2d 327; People v. Motuzas, 352 Ill. 340; Panton v. People, 114 Ill. 505; People v. Davis, 300 Ill. 226.) Although those cases state well recognized propositions of law with respect to the defense of self-defense and the proofs necessary to support that defense, they have no application to the case at bar in that, as stated in People v. Maurantonio, 8 Ill. 2d 60, a review of the record reveals that the trier of fact was justified in finding that defendant did not act in self-defense when he killed the deceased.

Therefore the judgment is affirmed.

JUDGMENT AFFIRMED.

McNAMARA, J., and LYONS, J., concur.

52283

LEO ROTH, Plaintiff-Appellant, vs. PAUL KANCHIER, JR., Defendant-Appellee.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

This was an action to recover damages for injuries allegedly incurred by plaintiff as a result of a collision involving automobiles driven by plaintiff and defendant. The jury returned a verdict for defendant and judgment was entered thereon. Plaintiff appeals, maintaining the verdict is against the manifest weight of the evidence, that the trial judge erred in interposing his personal objections to certain of plaintiff's testimony even though defense counsel made no objection thereto, and that the trial judge abused his discretion in refusing to allow plaintiff to exhibit an injury, allegedly sustained in the accident, to the jury.

The mishap occurred on October 7, 1958, at the side-street intersection of 88th and Ada Streets in Chicago. There are no traffic controls at the intersection. Plaintiff, Leo Roth, testified he was driving south on Ada Street approaching 88th Street at a speed of ten to fifteen miles per hour. He testified he looked both to the left and to the right as he approached the intersection and observed no automobile traffic on 88th Street. As he entered the intersection he saw defendant's automobile about five feet to his left traveling westerly on 88th Street at a speed of approximately forty miles per hour "a split second" before the impact. Plaintiff stated that defendant's automobile struck his automobile in the side, doing considerable damage to both the front and rear doors, rendering the automobile a total loss. Plaintiff testified his automobile was eight years old at the

time of the collision and had been purchased by him some two or three years earlier for $400 or $500. Plaintiff stated he was unable to exit his automobile from the left side after the collision and that he was forced to remain in the automobile until he was aided out from the right side by two men.

Plaintiff testified that in the collision his head struck the inside rear view mirror, that he sustained injuries to his back, chest and forehead, and that his tongue was injured and bleeding, all of which required medical care. Plaintiff stated he did not seek medical attention until five weeks after the mishap. During plaintiff's case in chief his counsel sought to have plaintiff exhibit his tongue to the jury for the reason that the doctor who had initially treated the tongue had died prior to trial; the trial judge denied the request.

On cross-examination, plaintiff admitted that, although his automobile was the first one into the intersection, he was unable to say where defendant's automobile was when his own automobile entered the intersection.

Defendant, Paul Kanchier, Jr., testified that he was driving westerly on 88th Street approaching the intersection with Ada Street at a speed of approximately thirty miles per hour. When he reached a point some sixty feet from the intersection, he began to brake his automobile. As he entered the intersection, he observed plaintiff's automobile for the first time and swerved to the left to avoid a collision. The right front fender and bumper of defendant's automobile came into contact with the left front fender of plaintiff's automobile in front of the front wheel and both of the automobiles came to a stop in the southwest quadrant of the intersection. This latter testimony was corroborated by the police officer who investigated the accident. Defendant stated that he was unable to estimate the rate of speed of his

automobile at the time of the impact. He further testified that as he was unfastening his seatbelt immediately after the accident, plaintiff was at his window, swearing and asking if he was injured. Plaintiff thereafter stated, "Oh, my back." Defendant testified, as did the investigating police officer, that plaintiff looked and acted physically normal after the accident.

Plaintiff's contention that the jury's verdict is against the manifest weight of the evidence is unavailing. It is clear from the record the jury could reasonably have found plaintiff to have been the proximate cause of the accident or to have been contributorily negligent in the operation of his automobile. A reviewing court will not reweigh the evidence and set aside a jury's verdict because the jury could have arrived at a different conclusion. Paul Harris Furniture Co. v. Morse, 10 Ill. 2d 28, 42-43.

Plaintiff testified that his vehicle was the first one to enter the intersection, at a speed of ten to fifteen miles per hour and to the right of defendant's approaching vehicle. He stated that before entering the intersection he looked to the left and to the right, and saw no approaching traffic on 88th Street. Yet, as he entered the intersection he observed defendant's automobile "a split second" before the impact. He further stated he did not see defendant's automobile until it was approximately five feet from him. The jury would have been justified in believing plaintiff failed to keep a proper lookout before entering the intersection, especially in light of the fact that on cross-examination plaintiff admitted he did not know where defendant's vehicle was at the time his own vehicle was crossing the north curbline of 88th Street.

The only evidence of injuries allegedly resulting from the

accident was plaintiff's own testimony. The police officer who investigated the accident testified that plaintiff made no complaint of injury to him at the scene and further testified, as did defendant, that plaintiff looked and acted physically normal after the accident. Plaintiff failed to consult a doctor until some five weeks after the mishap. Plaintiff's testimony as to the times and dates of his visits to doctors and treatments received was vague and uncertain. Although the doctor who was initially consulted by plaintiff for his injuries allegedly incurred in the accident died prior to trial, plaintiff testified he consulted other doctors; yet, not one of these other doctors was called as a witness to substantiate plaintiff's claim of injury or the extent thereof.

Plaintiff's credibility was impaired when he testified to the extent of the property damage to his automobile and to the extent of his own injuries. He stated both doors on the left side of the automobile were seriously damaged, to the degree that he had to be helped from the automobile from the other side. Defendant and the investigating police officer, a disinterested witness, both testified that the damage was to the forward portion of the left front fender of plaintiff's vehicle. Although plaintiff infers that his automobile was a "total loss" as a result of the accident, necessitating its sale for only $35.00, the jury could reasonably have found that a factor which contributed to this low price was that the vehicle was eight years old at the time of the accident, purchased by plaintiff some two or three years earlier for $400 or $500. Defendant and the officer further testified that plaintiff looked and acted physically normal after the accident and the officer further stated plaintiff made no complaint of injury to him at the scene. The jury would likewise be justified in disbelieving plaintiff's testimony that defendant was traveling some forty miles per hour at

the time of impact, in light of the fact he testified he observed defendant's vehicle for the first time only five feet away from him "a split second" before the impact. The record establishes plaintiff vacillated in many of his answers as a witness and was unresponsive to many of the questions propounded. Defendant's testimony, on the other hand, was straightforward. The verdict was not against the manifest weight of the evidence.

The argument is raised by plaintiff that the evidence conclusively shows that his automobile was the first one into the intersection, entering to the right of defendant's automobile, and consequently defendant violated his duty to afford plaintiff the right-of-way as required by Section 165 of Chapter 95-1/2 of the 1957 Illinois Revised Statutes. While the principle of law advanced by plaintiff is correct, it has no application to the case at bar inasmuch as the statute does not give the party who has the right-of-way the additional privilege of proceeding into an intersection without first maintaining a proper lookout.

Plaintiff next contends the trial judge erred in interposing his personal objections to certain of plaintiff's testimony although defense counsel saw fit not to object. It appears that the sole objection voiced by the trial judge to matters offered by plaintiff was when plaintiff's counsel requested that plaintiff be allowed to exhibit his tongue to the jury. After the trial judge stated, "Objection," he called both counsel into chambers and offered to grant plaintiff a mistrial on the grounds that he, the judge, had committed error in raising the objection himself. During the discourse in chambers regarding this matter, plaintiff's counsel stated on at least five occasions, in response to the trial judge's offers, that he did not desire a mistrial, on at least two occasions that he was agreeable with the manner the judge was conducting the trial, and that if the judge wished to prevent him from offering to

have plaintiff exhibit his tongue to the jury, he, plaintiff's counsel, would have no objection. Clearly, plaintiff waived any error in this regard and cannot now raise it on appeal. Bowman v. Illinois Cent. R. Co., 9 Ill. App. 2d 182, 222.

The other matters referred to by plaintiff as instances of interference with the presentation of his case on the part of the trial judge are no more than admonitions by the judge to plaintiff while on the witness stand to respond to the questions propounded, to refrain from volunteering matters not called for by the questions, and the like. The record discloses the plaintiff was a rather difficult witness. Considerable latitude is allowed a trial judge in the conduct of the trial and we feel he did not overstep his authority in this regard and create prejudice in the minds of the jury. See Piechalak v. Liberty Trucking Co., 58 Ill. App. 2d 289, 300.

The final contention raised by plaintiff is that the trial court erred in refusing to allow him to exhibit his tongue to the jury. It is well established that it is discretionary with the trial judge whether to allow injuries to be shown to the jury. Howard v. Gulf, Mobile & Ohio R.Co., 13 Ill. App. 2d 482, 488. Plaintiff makes no showing that he was prejudiced by the trial judge's refusal to allow him to exhibit his tongue to the jury. Plaintiff had already testified that he injured his tongue in the accident, that it was bleeding as a result of the injury, that he had difficulty thereafter speaking, and that he did not consult a doctor until some five weeks after the accident. It would appear that it would have served no useful purpose to allow plaintiff to exhibit his tongue to the jury. The trial judge viewed the plaintiff's demeanor and was aware of the effect the exhibition of the tongue would have on the jury. It should be further noted that plaintiff's counsel stated, during the colloquy in

chambers relative to the exhibition of the tongue, that if the judge desired to prevent the exhibition he, plaintiff's counsel, would have no objection. We are of the opinion that the trial judge did not abuse his discretion in refusing to allow plaintiff to exhibit his tongue to the jury.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

McNAMARA, J., and LYONS, J., concur.

Case No. 67-22

In The

APPELLATE COURT OF ILLINOIS

Third District

A.D. 1967

EVEY M. STERNBERG	)	
	)	Appeal from the Circuit Court
Plaintiff-Appellant	)	of Peoria County
	)	
vs.	)	The Honorable
	)	Edward Haugens,
ROBERT M. STERNBERG	)	Judge Presiding
	)	
Defendant-Appellee	)	

Abstract

STOUDER, P.J.

The parties hereto were divorced in the Circuit Court of Peoria, County in July, 1960, and by the decree the custody of the two children involved in this appeal were awarded to the Defendant-Appellee, Robert Sternberg, Sr. The custody of another child not involved in this proceeding was awarded to the Plaintiff-Appellant and the Defendant was ordered to contribute to the support of said child. Pursuant to a petition the decree of divorce was modified in January, 1966, and the custody of the two children, previously awarded to the Defendant, was awarded to Plaintiff. At the same time the Defendant was found to be in contempt of the order requiring him to support the child in the custody of the Plaintiff and was confined in the county jail of Peoria County until mid April, 1966. In August, 1966, Defendant petitioned for the modification of the custody order. Hearings were held and in December, 1966, custody of the children was transferred to the Defendant and it is from this order that this appeal is taken.

Appellant, by motion made in this court, has requested that the record of the proceedings be supplemented by including a statement of the trial court judge,

The order appealed from was entered on December 2, 1966, and notice of appeal was filed by Appellant on December 21, 1966. The statement of the trial court judge, sought to be included as part of the record, was entered on May 24, 1967, and relates to conferences which the judge had with the children in January and May of 1967. The judge in his statement expresses a clear awareness that he has lost jurisdiction of the case because of the pendency of the appeal but concludes that in the interest of justice he is obliged to express his opinion to the Appellate Court. However we are unable to agree with Appellant that there is any authority in the rules governing Appellate procedure for inclusion of such a statement in the record on appeal and accordingly the motion to supplement the record by including such statement is denied.

There is substantial agreement between the parties on the general principles of law applicable to this case. The trial court has broad discretion in determining the custodial arrangements which are in the best interests of the children. The exercise of such discretion will be sustained unless it can be shown that it has been abused. The primary objective is the determination of what will be in the best interests of the children rather than a matter of penalty or reward to the parents. Stability of environment has long been deemed an important factor in the welfare of children and it follows that custodial arrangements should not be altered unless there is a change in circumstances related to the welfare of the children. Nye v. Nye, 411 Ill. App.408, 105 N.E. 2d 300 and Leary v. Leary, 61 Ill. App. 2d 152, 209 N.E. 2d 663. The burden of establishing such a change in circumstances is upon the party seeking such change.

We have reviewed the record and in our opinion it fails to support the conclusion that there has been a change in circumstances of the parties affecting the welfare of the children. The principal change in circumstance relied upon by Appellee to support the decree of the trial court relates to his rehabilitation and the desires of the children. While the rehabilitation of Appellee is commendable we are unable to see how such conduct is related to the best interest of the children. Maupin v. Maupin, 339 Ill. App. 484, 90 N.E. 2d 234. In January, 1966,

the trial court determined that it was in the best interests of the children that custody be awarded to Appellant. No appeal was taken from this order and no argument is made that the trial court was not fully advised of all the circumstances existing at that time. The trial court did not find and the record would not support a finding that Appellant is unfit or that the children were not receiving proper supervision or attention.

This brings us to the desires of the children upon which it appears the trial court placed some reliance. The desires of children are properly considered in determining an appropriate custodial arrangement. Such desires are not controlling and must be viewed in relation to all other circumstances. (See Stickler v. Stickler, 57 Ill. App. 2d 286, 206 N.E. 2d 720, which discusses the preference of children in detail.) In January, 1966, the court transferred the custody from Appellee to Appellant. Prior to the entry of said order, the trial court had interviewed said children and ascertained that they desired to return to Centralia to live with Appellee and his parents. The trial judge, in connection with the announcement of his decision, concluded that the children had been alienated from Appellant. Subsequent to the filing of the petition for request of transfer of custody back to Appellee the trial judge again interviewed the children and they again indicated their desire to return to Centralia. The record does not indicate that the same bitterness of feeling existed. In this connection it should be noted that custody of the children was awarded to the mother in January, 1966. The father was confined in jail until April, 1966, a circumstance not calculated to improve the relationship between the children and their mother. The father filed his petition for return of custody in August, 1966. Considering the relatively short period during which the children were with their mother and the influence exerted upon the children prior thereto, it is not surprising that the childrens' desire to return to Centralia had not changed. For these reasons we cannot ascribe any particular value to the attitudes of the children. Such attitudes do not support the conclusion that a change of circumstance has occurred or that change of custody would be in their best interest.

Accordingly we believe that the trial court erred in modifying the custodial provisions of the divorce decree as amended and the order of the Circuit Court of Peoria County is reversed.

JUDGMENT REVERSED.

Alloy, P.J., and
Scheineman, J. concur.

51565

CITY OF CHICAGO, a Municipal Corporation, Plaintiff-Appellee, vs. JAMES CADILLAC THOMAS, Defendant-Appellant.	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY

MR. PRESIDING JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

The plaintiff, City of Chicago, filed a quasi-criminal complaint against "James Cadillac Thomas," charging him with building violations of its municipal code. After a trial an order was entered by the court which recited that the defendant had been found guilty of the ordinance violations alleged in the complaint, and a fine of $1,000.00 plus costs was imposed and execution was issued for the amount of the fine and costs, "as to J. Thomas, Conservator."

The Statement of Claim filed by the City charges that on August 12, 1965, James Cadillac Thomas owned, maintained, operated, collected rents for, or controlled the building situated at 3238-40 South Indiana Avenue, Chicago, Illinois. The Statement of Claim then goes on to allege, in twenty-seven counts, violations of the Municipal Code of Chicago.

On December 9, 1965, the firm of Partee and Green filed appearances on behalf of defendants, James Cadillac Thomas and Chicago Metropolitan Mutual Assurance Company. On April 14, 1966, the firm of Glasser and Eifert filed an appearance for James A. Thomas, Successor Conservator of the Estate of Sadie Blair, Incompetent. When the cause was called for trial on April 14, 1966, Helmut Eifert informed the court that he had filed an appearance that morning for defendant, James A. Thomas, in his representative

capacity. Eifer requested a continuance because he was not too familiar with the facts of the case, and also stated that he was sure that the alleged violations had been corrected. The court denied this request for a continuance and ordered the case to proceed to trial.

The only evidence for the plaintiff was introduced through the testimony of Michael Manoogian, a building inspector. He testified that he inspected the building on August 12, 1965, and found a number of violations of the Building Code. The same situation prevailed on December 1, 1965. However, on February 7, 1966, Manoogian found that work was in progress to correct the violations, and that a building permit had been issued for this purpose. On his final visit to the premises on March 14, 1966, Manoogian found that complete compliance had been achieved except for one class "B" door that had been ordered.

At the conclusion of Manoogian's testimony the court made a finding of guilty and imposed the aforementioned fine. Defendant, Chicago Metropolitan Mutual Assurance Company, was non-suited at the City's request. The court then denied defendant's motion for a new trial. Defendant appeals from the judgment and from the court's order denying his motion for a new trial.

The defendant contends, on appeal, that the plaintiff failed to prove that James A. Thomas, Successor Conservator of the Estate of Sadie Blair, Incompetent, had any relationship to the premises which contained the Building Code violations alleged in the complaint, and therefore, a finding of guilty could not be entered against him. We agree with this contention.

The complaint in the instant case alleges that "James Cadillac Thomas" is responsible for the premises violative of the Municipal Code. James Cadillac Thomas had been served with summons, and an appearance was filed on his behalf by the firm of Partee and Green. No amendment was ever filed by the plaintiff making "James A. Thomas, Successor Conservator of the Estate of Sadie Blair," a party defendant. No evidence was introduced at trial to prove that the Successor Conservator had any connection with the building at 3238-40 South Indiana Avenue, yet the court found him guilty of the violations alleged in the complaint and subsequently issued a warrant for his arrest and commitment.

McQuillin states in his treatise the Law of Municipal Corporations: "In a proceeding to enforce a police ordinance, the burden is upon the plaintiff or prosecution to establish, by evidence conforming to the requisite degree of proof, all of the elements necessary to constitute the offense." 3rd Edition, Volume 9, §27.50, Page 745. The finding of guilt in the instant case and the judgment entered thereon were improper because the City failed to allege and prove that James A. Thomas, Successor Conservator of the Estate of Sadie Blair, was guilty of the alleged violations.

The statement of the City that "contrary to the defendant's position, the court does not have to guess what connection he had with the subject property" is untenable. To further disguise the weakness of its position the City, in its brief, chooses to refer to the defendant only as "Thomas," which is palpably improper. It is true as the City points out that these proceedings are governed by the applicable provisions of the Civil Practice Act, and

not by the rules and laws applicable to criminal proceedings. However, as was pointed out by the court in Village of Maywood v. Houston, 10 Ill. 2d 117, 139 N.E.2d 233, an action to recover penalties for the violation of a city ordinance is not exclusively civil or criminal, but possesses attributes of both. The complaint in the kind of quasi-criminal action exemplified by the instant case must clearly describe the violations alleged and designate the accused exactly. City of Chicago v. Campbell, 27 Ill. App. 2d 456, 170 N.E.2d 19. In a proceeding for a penalty we believe something more than a routine inquiry is necessary before a fine, nonpayment of which can lead to incarceration, is imposed.

The City heretofore filed a motion to dismiss this appeal which motion we denied. We are asked to reconsider our decision and upon such reconsideration we affirm our prior ruling.

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

ADESKO and MURPHY, JJ.
concur.
Abstract only.

94 IA 2 257

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 4th day of December, in the year of our Lord one thousand nine hundred and sixty-seven, within and for the Second District of Illinois:

Present -- Honorable MEL ABRAHAMSON, Presiding Justice
Honorable THOMAS J. MORAN, Justice
Honorable CHARLES H. DAVIS, Justice
HOWARD K. KELLETT, Clerk
HARRY E. BOOTH, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On MAR 22 1968 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

No. 67-44 Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

EVERETT LEDBETTER and KATHLEEN LEDBETTER,	)	
Appellees,	)	
v.	)	Appeal from Circuit Court Kane County
CHARLES RIVERS AIKEN,	)	
Appellant.	)	

MR. PRESIDING JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment order entered December 20, 1966, by the Circuit Court of Kane County in the amount of $21,318.64 in favor of the plaintiffs-appellees, Everett and Kathleen Ledbetter, on Count III of their amended complaint, and against the defendant-appellant, Charles R. Aiken, on his 3-count counterclaim.

The original complaint, in two counts, was filed on October 28, 1965, and alleged that the parties had, on or about April 4, 1965, entered into an oral agreement whereby Aiken would pay the Ledbetters "the daily rate for the care, upkeep

and training of certain horses" owned by Aiken. The Ledbetters further alleged that in accordance with that agreement they "expended labor, skill and material in maintaining said horses" but that the defendant failed to pay the daily rate and was thus indebted to them in the amount of $16,879.66 through October 14, 1965. Count II claimed a lien for that amount against the horses.

On November 24, 1965, pursuant to an agreement between the parties, an order was entered that permitted Aiken to remove his horses from the Ledbetter farm after he had filed his surety bond with the court in the amount of $25,000.00 to cover the damages claimed. In accordance with that order, the horses were moved on November 26.

On December 2, 1965, Aiken answered the complaint by way of a general denial and filed his counterclaim wherein he alleged that the parties had entered into a written agreement on December 13, 1963, whereby the Ledbetters had agreed to board, train and furnish "complete care" for his horses for a specified monthly rate. Count I of the counterclaim asked for an accounting of any amounts received by the Ledbetters as stud fees for the use of his horses, and counts II and III alleged damage to the horses caused by the negligent care of the Ledbetters in the amount of $25,000, which ad damnum was later increased by amendment to $100,000.00. The Ledbetters answered the counterclaim with a denial and, on January 19, 1966, were permitted by the trial court to file an amended complaint that included

a count III that also alleged the existence of the written contract and claimed damages for the failure of Aiken to pay the agreed monthly charges in the amount of $20,720.54 through November 26. The matter went to trial, without a jury, on that day on count III of the amended complaint and the counterclaim.

The evidence disclosed that the Ledbetters own a 135 acre training farm outside of St. Charles and that Aiken, a Chicago attorney, is, or at least, was, the owner of a large number of thoroughbred racing horses. In late 1963, the parties had a number of conversations relative to boarding Aiken's horses at the farm. In December, 1963, Everett Ledbetter wrote a short letter to Aiken that provided that Ledbetter agreed to board and train Aiken's horses at specified monthly sums that varied as to the type and age of the animal, and stated that the horses would be given "complete care". Under Ledbetter's signature, a notation was added that stated in part "Accepted at Chicago, December 13, 1963..... Any other services or handling of my horses not provided for herein shall be upon terms reached by mutual agreement in writing" and signed by Aiken. At a subsequent conversation, Ledbetter told Aiken that he would care for the horses "as if they were (his) own children".

On the basis of that agreement, in February, 1964, Aiken began to move a number of his horses to the Ledbetter farm and things apparently progressed satisfactorily for both parties until the spring of 1965. At that time, Aiken fell behind in the payment of the monthly charges. On April 30, he made a

payment of $3180.11 that brought his account current through March 15 with the exception of an amount that the Ledbetters, through oversight, failed to include in previous statements. Thereafter, no further payments were received until June 29 when, in response to an urgent telephone call from Ledbetter, Aiken returned from Michigan to make a cash payment of $5,000.00. Aiken never returned to the farm after that date or made any further payments. On November 24, 1965, Aiken notified the Ledbetters by mail that the agreement was terminated, although suit by that time had already been filed, and demanded an accounting for the alleged stud fees.

On November 26, in accordance with the agreed order of court, all of Aiken's horses (39 at that time) were transported from the farm. Nine of them were removed to Red Gate Farm in St. Charles and the remainder to Bourbon Hills Farm in Kentucky. The owner of Red Gate testified that the horses' feet and hooves needed attention when they arrived there on November 26. Dr. Cornelius, a veterinarian, examined the horses shortly after their arrival at Red Gate and testified that several of them had "thrush", a bacterial infection of the foot, and that all the horses needed to be "wormed". Dr. Bardwell, a veterinarian at Bourbon Hills, examined the horses transported there and the others at Red Gate and testified that all were heavily infested with worms, were suffering from a condition comparable to malnutrition, and that it would take approximately a year and a half to restore them to normal health. The trial court

entered judgment in favor of the Ledbetters at the conclusion of the proofs.

The principal contention of the defendant in this appeal is that the plaintiffs' non-performance of their own obligations under the contract precludes them from recovery for his non-payment of the monthly charges. As a general statement of the law, it is unquestionably correct that in order for a party to recover on a contract it is necessary that he perform his own obligations under it. South Beloit Elec. Co. v. Lar Gar Enterprises, 80 Ill. App. 2d 367, 374; Archibald v. Board of Education, 19 Ill. App. 2d 554, 561. The agreement provided that "complete care" was to be furnished the horses during their stay at the Ledbetter farm. It was undisputed that the horses hooves were in need of "trimming" and that they required "worming" to remove internal parasites as of November 26, 1965. It appears from the testimony that "trimming" and "worming" are recurring services that must be performed for horses by a blacksmith and veterinarian respectively. The defendant maintains that these services must be included within any reasonable definition of the phrase "complete care" as it applies to a horse and that he assumed that his horses would be so treated. Aiken urges further that any ambiguity in the phrase must be interpreted most strongly against Ledbetter as the party who drafted the agreement.

In order to determine if the phrase "complete care" as used in this agreement included "trimming" and "worming", it is necessary to ascertain the intention of the parties by an examination of all of the facts and circumstances, including the practical construction that the parties themselves have applied to it by their contemporaneous or subsequent conduct. Knorr v. White Bros. Trucking Co., 79 Ill. App. 2d 471, 477, 478; Coney v Rockford Life Ins. Co., 67 Ill. App. 2d 395, 399, 400;

Cemetery Assn. v. Vil. of Calumet Park, 398 Ill. 324, 335.

Aiken's horses had been regularly "wormed" by Dr. Cornelius both before and after their arrival at the Ledbetter farm and his bills mailed monthly to Aiken for payment. Similarly, the blacksmith, Elmo Rasmussen, "trimmed" the horses through February, 1965, and billed Aiken directly for this service. Both Cornelius and Rasmussen testified as Aiken's witnesses and admitted that they experienced some difficulty in obtaining payment from Aiken for their services during 1965, although they denied that they had refused to further treat the horses for that reason. Aiken regularly received the bills for these services and never notified the Ledbetters that it was his understanding that his horses were to be thus serviced by them as part of the "complete care" that they had agreed to furnish. Under these circumstances, we must conclude that the parties did not intend that the worming and trimming of the horses would be done by the Ledbetters.

The evidence as to general condition of the horses was controverted. Dr Bardwell described them as undernourished, deficient in red blood cells and "sick". An affidavit from Aiken appears in the record that avers that each and every horse was suffering from long or broken hooves, parasitic infection and "medical consequences due to lack of adequate and/or proper feeding", but it also appears that he had not seen most of the horses after June of 1965. Cornelius, on the other hand, testified that he examined each horse prior to their removal on November 26 at the direction of Aiken and that their condition was "satisfactory". He also stated that he had visited the farm once or twice a week, that it had an "adequate" pasture and that the feed furnished Aiken's horses was "good".

The defendant also argues that there was no evidence introduced

to substantiate the judgment of $21,318.64 awarded by the trial court. Count III of the amended complaint was filed January 19, 1966, praying for the judgment in the amount of $20,720.54. Subsequently, on the 25th of January, 1966, by leave of Court, plaintiffs amended Count III by increasing the ad damnum to $21,318.64, the amount allegedly owed on the basis of the agreement through November 26. Kathleen Ledbetter testified that she was a partner at the farm with her husband; that she maintained the books for the business, prepared and mailed the monthly statements for the service charges, and noted all payments received. Over the objections of the defendant, she was permitted to testify that as of November 26 his account had a balance due of $21,318.64. The defendant contends that this testimony alone is insufficient to support the award since Mrs. Ledbetter admitted she was not a certified accountant and that she "made minor mistakes in mathematics once in awhile". In addition, the defendant points out that Mrs. Ledbetter had first averred that the agreement with Aiken was an oral one and then changed her story to claim it was written and that therefore little credence could be attached to any of her testimony. His objections in this respect relate to the weight, and not the admissibility, of the testimony. Clearly, Mrs. Ledbetter was competent to testify as to the amounts billed and received even if the books of account themselves were not admitted into evidence. The factors enumerated by the defendant were known by the trial court and, as the trier of fact, it was within its prerogative to weigh the evidence in view of those factors.

Similarly, it was for the trial court to consider the evidence introduced by the defendant to support the counterclaim. On January 7, 1966, eleven of Aiken's horses were sold at auction for a cumulative price that, in the opinion of Dr. Bardwell, was $18,500 less than their market value would have been had they been in normal physicalcondition. No

other evidence as to the actual damages suffered by Aiken was offered. The trial judge observed these witnesses, listened to their testimony and was in a unique position to determine their credibility. A court of review will not substitute its judgment for that of the trial court unless it is against the manifest weight of the evidence. Elgin Lumber & Supply Co. v. Malenius, 232 N. E. 2d 319, 323, _____ Ill. App. 2d _____; Peet v. Dolese & Shepard Co., 41 Ill. App. 2d 358, 369. The record in this case does not indicate that the judgment of the trial court was against the weight of the evidence and it will be, therefore, affirmed.

JUDGMENT AFFIRMED.

DAVIS and MORAN, J. J., concur.

94IA2257

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 4th day of December, in the year of our Lord one thousand nine hundred and sixty-seven, within and for the Second District of Illinois:

Present -- Honorable MEL ABRAHAMSON, Presiding Justice
Honorable THOMAS J. MORAN, Justice
Honorable CHARLES H. DAVIS, Justice
HOWARD K. KELLETT, Clerk
HARRY E. BOOTH, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On the 24th day of June, A.D. 1968, the Supplemental Opinion of the Court on the denial of Petition for Rehearing was filed in the Clerk's Office of said Court, in the words and figures following, viz:

No. 67 44

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

EVERETT LEDBETTER and KATHLEEN LEDBETTER,	)	
Plaintiffs-Appellees,	)	
v.	)	Appeal from Circuit Court Kane County
CHARLES RIVERS AIKEN,	)	
Defendant-Appellant	)	

SUPPLEMENTAL OPINION

One of the points urged in the Petition for Rehearing filed by the Appellant is the rule stated in Inter-State, etc. Corp. v. Jewelry Co., 280 Ill. 116, 119, where the Court held:

> "It is objected here, as it was in the trial and the Appellate Courts, that his testimony on this question was incompetent without having in court and in evidence all the books in which these various items were entered. The material contents of an existing book of original entry which is obtainable cannot be proven by parol testimony, as the book itself is the best evidence. Account books, if in existence, are the best evidence of their contents, and a witness may not state the condition of such accounts from memory while such books are accessible." (emphasis added)

The original books of entry kept in the ordinary course of business were in the handwriting of Mrs. Ledbetter, Exhibit 31 for 1965 and Exhibit 32 for 1964. They were offered in evidence and were available to the defendant, but upon objection by the defendant, the court refused to admit them into evidence.

The books were used for the purpose of refreshing the memory of the witness and were available to the defendant for examination.

We are of the opinion that the trial court was in error in not admitting the original books of entry into evidence, but in view of the facts herein there appears to be no prejudicial error of which the defendant can now complain.

We find no error and reaffirm the opinion filed.

The Petition for Rehearing is denied.

DAVIS, J. and MORAN, J. concur.

No. 66-143

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- KASCELL JENNINGS, Defendant-Appellant.	Appeal from the Circuit Court, Twentieth Judicial Circuit, St. Clair County, Illinois Honorable Joseph E. Fleming, Judge Presiding.

George J. Moran, J.

Kascell Jennings was tried and found guilty of armed robbery from the persons of Carol Goodwin and Danny Goodwin, respectively. The robbery was alleged to have occurred in the Henny Penny Restaurant in East St. Louis, St. Clair County, on October 24, 1965. Defendant contends that the trial court committed reversible error in the admission of erroneous evidence.

Carol Goodwin and her brother-in-law, Danny Goodwin, were employed by the Henny Penny Restaurant in East St. Louis, Illinois, on October 24, 1965 when it was held up.

George Thompson, an East St. Louis, Illinois, police officer testified that on the 17th of January, 1966, he and another East St. Louis police officer were investigating the holdup and in the course of their investigation went by the respective homes of Carol Goodwin and Danny Goodwin and showed them a group of photographs, including one of the defendant. He was permitted to testify over the objection of the defendant that Carol and Danny both identified the defendant from the group of pictures exhibited to them by the police officers. This testimony was clearly inadmissible. People v. Krejewski, 332 Ill 120; People v. Lukoszus, 242 Ill 101; People v. Cappalla, 324 Ill 11; People v. Wright, 65 Ill App 2d 23; People v. Harris, 83 Ill App 2d 422.

Leon Lucas and Hillman Rainwater had been indicted along with the defendant for the robbery in question, but the indictments against them had been dismissed by the State. They both testified against Jennings. Rainwater testified that he met Leon Lucas and the defendant on October 24, 1965 in a tavern in "Eagle Park",

Madison County, Illinois. They left Eagle Park and went to Centerville, Illinois, where they had one beer and headed back for Eagle Park. Leon Lucas drove. Rainwater sat in the front seat between the driver and Jennings. They drove to East St. Louis and when they reached Eleventh Street and St. Louis Avenue, Jennings said, "Wait here. I want to see a guy. Be back in a minute." The gears of the car jammed and they stopped on Eleventh Street headed toward St. Louis Avenue. Rainwater did not know where Jennings went, but he returned running. Lucas was behind the wheel and Rainwater was in the middle. Jennings had a gun in his hand and when Rainwater asked him to put it away, Jennings threatened to blow his brains out. They all went back to the tavern in Eagle Park. Over the objection of the defendant, Rainwater testified that when he left the tavern Jennings was waiting for him and said, "I'm going to shoot you;" that Jennings then knocked him down and hit him in the mouth with the gun.

Defendant contends that Rainwater's testimony concerning Jennings' assault on him with a gun was evidence of another crime wholly unconnected with the crime for which he was being tried and was reversible error. He argues that the detailed description of the assault on Rainwater by Jennings had no bearing whatsoever on the crime for which Jennings was being tried; that its only effect would be to inflame the jury against the defendant and it was therefore reversible error.

Evidence of a distinct, independent substantive offense cannot be admitted on the trial of the defendant for another and different offense unless it clearly shows that such evidence tends in some way to prove him guilty of the offense for which he is being tried. Farris v. The People, 129 Ill 521; The People v. King, 29 Ill 2d 150. We fail to see how the assault by Jennings on Rainwater tended in any way to prove Jennings guilty of the crime for which he was being tried. This evidence had no probative value and was likely to prejudice the jury against the defendant and cause them to lose sight of the issues they were sworn to try.

Defendant also contends that the pre-trial identification testimony admitted into evidence against him denied him due process of law guaranteed him by the Fourteenth Amendment to the Constitution. Carol Goodwin and Danny Goodwin

testified that Officer Thompson and another East St. Louis police officer came to their homes and showed them some photographs, including one of the defendant; that they picked the defendant's photograph from the group and that the officers then took Carol and Danny Goodwin to the county jail at Belleville, Illinois where they identified the defendant as the man who held them up on the night in question. The evidence disclosed that they were told that the man who held them up on the night in question was in custody at the county jail and that they were being taken there to identify him. When they reached the jail the police officer had them walk past a room where the defendant was seated in a chair, but they could not distinguish him at that time. The officer then took them to another room and the defendant walked in front of them. They then recognized him. They both identified the defendant as the man who held them up on October 24, 1965, after first testifying concerning their pre-trial identification of him. Defendant argues that in the absence of an emergency the practice of showing suspects singly to persons for identification and not as a part of a line-up has been held unconstitutional by the United States Supreme Court in the case of Stovall v. Denno, 18 L. Ed. 1199, 87 S. Ct. 1967. We refrain from passing on this constitutional question since we dispose of this case on other grounds. Bismarck Hotel Co. v. Petriko, 21 Ill 2d 481.

For the reasons herein set forth, the judgment of the Circuit Court of St. Clair County is reversed and the cause remanded for a new trial.

The court wishes to thank appointed counsel for an excellent presentation of the issues.

Judgment reversed and cause
remanded for a new trial.

CONCUR:

Honorable Edward C. Eberspacher

Honorable Joseph H. Goldenhersh

PUBLISH ABSTRACT ONLY.

No. 67-44

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

91 I.A. 2d 262

BETTY McCABE, Objector-Appellant, -vs- PAUL DICKERSON, Administrator and LAWRENCE J. STARMAN, Defendants-Appellees.	Appeal from the Circuit Court, Second Judicial Circuit, Jefferson County, Illinois. In the Matter of the Estate of Callie Maddox, Deceased. Honorable Alvin Lacy Williams, Judge Presiding.

Per Curiam:

This is an appeal from an order of the Circuit Court of Jefferson County approving the final report of the administrator of the Estate of Callie Maddox.

The only issue on this appeal is whether the trial court was in error in overruling the sole heir's objections to the fees of the administrator and his attorney.

Callie Maddox died intestate in Jefferson County, Illinois, on March 30, 1965, leaving Betty McCabe as his sole heir at law. She signed a petition for the Public Administrator of Jefferson County, Paul Dickerson, a defendant in this appeal, to be appointed by the Court to administer the estate and he was so appointed. A duly licensed and practicing attorney in Jefferson County, Illinois, was employed as attorney for the estate.

The estate was handled to a conclusion by the administrator and his attorney. The estate had a gross value of $1,834.63, consisting of a diamond ring, automobile, household trailer, utility trailer and checking account.

Exclusive of administrator's fees and attorney's fees, the debts and costs in said estate amounted to $956.02, leaving the sum of $878.61 available to cover fees and distribution to the heir. The fees claimed by the administrator in the amount of $439.30 and by his attorney in the amount of $439.31 amounted to a total of $878.61, which was the exact amount remaining in the estate.

Betty McCabe objected to the amount of administrator's and attorney's fees in the final report and after a hearing on April 11, 1966, the trial judge (in Probate) entered an order overruling the objections and approving the final report as filed.

The administrator testified that the total assets of the estate consisted of a 1959 Oldsmobile, a 1954 Duo housetrailer and contents, a diamond Masonic ring and one two-wheeled wooden trailer; that after expending a considerable amount of time and effort, he sold the car for $400.00, the ring for $500.00, the housetrailer for $900.00 and the two-wheeled trailer for $25.00. The total receipts from the sale of these items was $1,825.00.

The reasonableness of the fee to an administrator or executor depends upon the circumstances of each case. Martin v. Central Trust Co., 327 Ill 622; In Re: Estate of Edwards, 312 Ill App 645.

In Mumper v. Murphy, 212 Ill App 52, the court in speaking of the reasonableness of administrator's fees said:

> "The principle upon which a court ordinarily acts is to allow a reasonable compensation, keeping in view the facts and circumstances of each particular case. The finding of the trial court does not preclude a court of appeal from fixing the compensation at a less sum than that fixed by the trial court." Id at 59.

In determining the reasonableness of the compensation to be allowed the administrator in the case at bar we consider the quality of the services performed, the advantage of his services to the estate, the time which he has expended, and the value of the estate. When we consider all of these relevant factors, it is our opinion that a reasonable fee for the administrator in this case would be the sum of $200.00.

There is no testimony in the record concerning the amount of time expended by the attorney in handling the estate, nor as to the reasonableness of his fee. However, a reviewing court may apply its own independent judgment in considering the question of the propriety of attorney's fees. Mumper v. Murphy, supra; In Re: Estate of Holman, 27 Ill App 2d 438. In the Manual on Fees, published by the Illinois State Bar Association in the Illinois Bar Journal of July, 1962, an

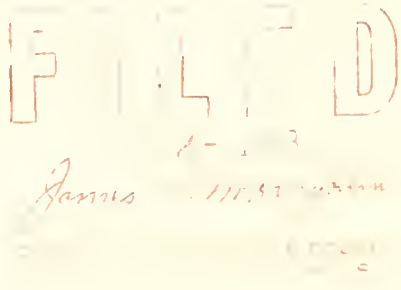
attorney's fee of $300.00 is suggested for estates up to a gross valuation of $4,000.00. In our opinion, the sum of $300.00 would be a proper fee in this case.

For the foregoing reasons the trial court is instructed to approve the final report of the administrator after allowing an attorney's fee of $300.00, and an administrator's fee of $200.00.

We remand this case to the Circuit Court of Jefferson County for further proceedings not inconsistent with this opinion.

Affirmed in part and
reversed in part and
remanded.

PUBLISH ABSTRACT ONLY.



No. M-51671

CORY CORPORATION, a corporation, Plaintiff-Appellant, vs. HUNTER-BUILT INCORPORATED OF CHICAGO, an Illinois corporation, and HOWARD SHAPIRO, Defendants-Appellees.	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. MUNICIPAL DIVISION.

MR. JUSTICE MC NAMARA DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from an order dismissing its amended complaint charging the defendants with fraud and deceit.

The allegations of the contested complaint are substantially as follows: Nelson Custom Kitchens ordered equipment from plaintiff. Plaintiff refused to extend credit. Nelson then referred plaintiff to defendant. Plaintiff telephoned defendant company and spoke with Howard Shapiro, its president, requesting credit information about Nelson. Defendants deliberately suppressed the truth and, to induce plaintiff to sell goods to Nelson, made false representation regarding Nelson's credit background. Defendants "knew at the time that Nelson recently underwent a material change in ownership and control resulting in Nelson being insolvent" and that they had never engaged in any credit transactions with the new principals. Plaintiff had no knowledge of these facts. In reliance on these representations by defendants, plaintiff sold and delivered the equipment to Nelson, who has never paid for them.

The sole issue on appeal is whether the amended complaint states a cause of action. Both sides agree that a motion to dismiss a complaint admits for the purpose of the motion all well-pleaded facts and all reasonable inferences which may be drawn from such facts. Defendants urge that the complaint properly was dismissed in that the averment of defendants' knowledge of Nelson's change of ownership is a conclusion of law; that with the conclusion of law stricken, the complaint is defective.

In the instant case we construe the averment of knowledge to be a statement of ultimate fact rather than a conclusion of law. In Doner v. Phoenix Joint Stock Land Bank of Kansas, 381 Ill. 106, 45, N.E.2d 20 (1942), a complaint which sought to impose a constructive trust on real estate alleged that each of the grantees knew plaintiff's rights in the premises when they accepted the conveyances. In reversing the trial court's dismissal of the complaint, the Supreme Court stated:

> "The allegation that each of the defendants, at and before the time they acquired their aforesaid purported conveyance, or paid the consideration, if any, for the execution of the same, knew of the rights of the plaintiff in the premises, and were charged with notice of said rights, was an allegation of ultimate fact and not a conclusion."

We believe this language to be controlling in the instant case. Plaintiff has set forth the facts of the alleged fraud and deceit with sufficient particularity and detail so that defendants can answer the complaint. Modern discovery practices will enable defendants to secure additional details, if needed, to prepare their defense. Tate v. Jackson, 22 Ill. App.2d 471, 161 N.E.2d 156 (1959).

The defendants cite Greenberg v. Neiman, 320 Ill. App. 99, 49 N.E.2d 817 (1943), for support of the proposition that a statement of knowledge is a conclusion at law. In that case a petition to vacate a judgment by confession alleged that defendant "recently learned" of the judgment. In ruling that defendant was not diligent in presenting the petition, the court stated that the phrase "recently learned" was a conclusion at law. Since, in the cited case, knowledge of diligence would be peculiar to the defendant, he would have to plead it specifically. It is not in point in the instant case.

For the reasons stated herein, the order of the Circuit Court sustaining defendants' motion to strike the amended complaint and dismissing the cause of action is reversed, and the cause is remanded with directions to require defendants to answer the amended

complaint and that such further proceedings be had as are not inconsistent with the views herein expressed.

ORDER REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

BURKE, P.J. and LYONS, J. concur.

51641

TRIVENNIA CARUSO,	
Plaintiff-Appellant,	APPEAL FROM THE
vs.	CIRCUIT COURT OF
NAZIE CARUSO,	COOK COUNTY, ILLINOIS.
Defendant-Appellee.	

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

Plaintiff, Trivennia Caruso, appeals from the entry of an order of modification of alimony and child support payments by the Circuit Court on July 22, 1966. Said order reduced, by modification, the alimony and child support payments to be made to plaintiff by defendant, Nazie Caruso, pursuant to a decree of divorce entered in the matter on November 9, 1965 (as modified by order of that court on March 9, 1966).

Subsequent to the entry of the first order of modification (from which no appeal is taken), plaintiff, on May 9, 1966, filed a petition below asking that defendant be held in contempt for certain arrearages. In response thereto, the court, on July 22, 1966, entered an order finding defendant in arrears and directed that he make good the deficiency. Significantly however, in absence of any pleading or request so to do being made by defendant, the court in that same order, and on its own motion, modified and reduced the alimony and child support obligations of defendant as established by its March 9th order.

Plaintiff submits on appeal that such latter order of modification was void as being in direct contravention of the provisions of Section 19 of our Divorce Act, which permits modification only upon application made. Defendant has failed to respond to the charge, having filed neither his appearance nor brief in answer to plaintiff's Notice of Appeal.

The applicable provision of the Divorce Act [Ill.Rev.

Stat.(1965) Chap.40, par.19] states:

> " . . . The court may, on application, from time to time, make such alterations in the allowance of alimony and maintenance, and the care, custody and support of the children, as shall appear reasonable and proper." [Emphasis supplied.]

This was the very provision construed in the case of San Fillippo v. San Fillippo, 340 Ill.App.353, 92 N.E.2d 201 (1950) under circumstances closely allied to that of the case at bar. A thorough dissertation on the subject will therefore not be necessary.

The authority of the Circuit Court to hear and determine divorce cases, as well as all matters ancillary thereto, is one specially conferred by statute. Section 19, accordingly, reserves a limited power to review alimony decrees which, by the statute's very nature, cannot be extended beyond its terms; to wit, "on application." While the trial judge is normally afforded considerable latitude in this regard to "make such alterations . . . as shall appear reasonable and proper," defendant here having made no application by petition or otherwise for the relief conferred, the court below acted without authority in entering its order of modification. Such order, accordingly, must be set aside. San Fillippo v. San Fillippo, supra.

For the above reasons, the order of July 22, 1966, is reversed and the cause remanded with directions to reinstate the order of March 9, 1966.

ORDER REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

BURKE, P.J., and McNAMARA, J., concur.